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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 728.

R. P. FARNSWORTH & CO., INC.,
Petitioner,

versus

TRI-STATE CONSTRUCTION COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR AMERICAN HOUSES, INC., IN OPPOSITION.

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TABLE OF CONTENTS.

	PAGE
OPINION BELOW and JURISDICTION	1
QUESTION PRESENTED	3
STATEMENT OF THE CASE	6
ARGUMENT	12
A:	
1. Alleged Erroneous and Conflicting Charges	12
2. Alleged Contract Interpretion by Jury	20
3. Legal Argument to Court	21
4. Prejudicial Comments	23
B:	
No Basis Exists for the Issuance of a Writ of Certiorari	24

Table of Authorities.

Cases:	Page
Chicago Great Western Railway Company v. *Scovel*, 232 F. 2d 952 (8th Cir. 1956); cert. den. 352 U. S. 835, 77 S. Ct. 53, 1 L. Ed. 2d 54	23
Defonce Construction Company, Inc. v. *City of Miami*, 256 F. 2d 425 (5th Cir. 1958)	13
Federal Trade Commission v. *American Tobacco Company*, 274 U. S. 543, 71 L. Ed. 1193, 47 S. Ct. 663	4, 5
Franklin v. *Shelton*, 250 F. 2d 92 (10th Cir. 1957)	22
Graver Tank and Manufacturing Company v. *Linde Air Products Company*, 336 U. S. 271, 93 L. Ed. 672, 69 S. Ct. 535	5, 25
Hawkins v. *Frick-Reid Supply Corporation*, 154 F. 2d 88 (5th Cir. 1946)	21
Illinois Central Railroad Company v. *Griffin*, 80 Fed. 278 (7th Cir. 1897)	13
Krienke v. *Illinois Central Railroad Company*, 249 F. 2d 840 (7th Cir. 1957)	15
Layne & Bowler Corporation v. *Western Well Works*, 261 U. S. 387, 67 L. Ed. 712, 43 S. Ct. 422	5, 2[illegible]
London Guarantee and Accident Company v. *Woelfle*, 83 F. 2d 325 (8th Cir. 1936)	22
J. T. Majors & Son, Inc. v. *Lippert Bros., Inc.*, 263 F. 2d 650 (10th Cir. 1958)	21
Michigan Mutual Life Insurance Co. v. *Oliver*, 256 Fed. 212 (5th Cir. 1919); cert. den. 250 U. S. 646, 39 S. Ct. 494, 63 L. Ed. 1187	22
N. L. R. B. v. *Pittsburgh Steamship Company*, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453	5, 25
Rutledge v. *Hudson*, 80 Ga. 266, 5 S. E. 9[illegible] (1887)	22

PAGE

Scarratt, et al v. *Cook Brewing Company*, 117 Ga. 181, 43 S. E. 413 16

Seaboard Loan Corporation v. *McCall*, 61 Ga. App. 752, 7 S. E. 2d 318 (1940) 16

Slaughter v. *Heath*, 127 Ga. 747, 57 S. E. 69 (1907) 22

Tashjian v. *Boston & Maine R. R.*, 80 F. 2d 320 (1st Cir. 1935) 22

United States v. *Wurtsbaugh*, 140 F. 2d 534 (5th Cir. 1944) 13

Wilkerson v. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497 69 S. Ct. 413 5

STATUTES:

Georgia Code Annotated, Title 103, Section 203 and Title 24, Section 3319 ..... 16, 22

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Opinion Below and Jurisdiction.

On November 20, 1957, Tri-State Construction Company (hereinafter called Tri-State), a Georgia corporation with its principal office in Atlanta, Georgia, instituted an action in the United States District Court for the Southern District of Georgia, Savannah Division, against R. P. Farnsworth and Company, Inc. (hereinafter called Farnsworth), a Delaware corporation with its principal office in New Orleans, Louisiana, to recover amounts allegedly due for work performed in the construction of housing at Fort Stewart, Georgia. Farnsworth in turn filed a counterclaim

against Tri-State and a third party complaint against Tri-State's surety, American Surety Company of New York, and also filed a third party complaint against American Houses, Inc. (hereinafter called American), a Delaware corporation with its principal office in Allentown, Pennsylvania and its surety, Federal Insurance Company. American in turn filed a counterclaim against Farnsworth to recover for the value of materials delivered.

Tri-State's claim against Farnsworth was for $146,518.28 due it for work performed for Farnsworth at its request. Farnsworth has never questioned the fact that Tri-State did in fact do this extra work, but simply contended that it was not responsible to Tri-State for it. Farnsworth counterclaimed against Tri-State and brought a third party complaint against American, claiming amounts due from them for delays and extra cost of doing the work. American counterclaimed against Farnsworth to recover the value of materials delivered by American to the job. Farnsworth admittedly owed American the amount of $164,949.80 for materials.

The case was tried before a jury and after a 10-day trial (R. 88) the jury returned a verdict in favor of Tri-State against Farnsworth in the amount of $133,020.80 and in favor of American against Farnsworth in the amount of $151,142.35.

From this verdict (R. 1395) and the judgments of the District Court (R. 1396, 1397) Farnsworth appealed to the United States Court of Appeals for the Fifth Circuit and on October 27, 1959, that court affirmed the judgments of the District Court. The opinion is reported at 271 F. 2d 728-738. On December 1, 1959, the Court of Appeals denied a motion for rehearing and following this denial petitioner then filed its petition for certiorari.

Question Presented.

Ground "a" urged by Farnsworth at page 2 of its brief was carefully considered by the Court of Appeals and as it stated: "The charges requested by the appellees clearly stated the law of the case, and Farnsworth cannot complain of conflicts brought about by its own erroneous request" (271 F. 2d 728 at 737, headnote 9). Ground "b" of Farnsworth was carefully considered by the Court of Appeals wherein the court held: "The court's meaning and intent were, however, reasonable clear, that is, to submit to the jury the pleadings and the contracts in order for the jury to see their contents" (271 F. 2d 728 at 733, headnotes 1, 2).

Grounds "c" and "d" urged by Farnsworth fall within the discretion of the trial court in permitting argument to the jury and in making additions to a party's request to charge. These, too, were carefully considered by the Court of Appeals and no error found (271 F. 2d 728 at 738).

No basis exists in fact or in law for Farnsworth's contentions. It is clear that there has been no departure from the usual course of proceedings in the federal courts. Farnsworth is asking this court for a review of facts in an isolated situation which have been passed upon by a jury, a trial court, and a Court of Appeals—all adversely to it. Its petition should be denied.

From the following statement of the case it will be evident that the verdict of the jury was not unjust. Certainly it was amply supported by the evidence. It will be remembered that Tri-State's claim against Farnsworth was for $146,518.28 and that Farnsworth did not contest the fact that Tri-State had done this work; it simply refused to pay Tri-State for it. The jury found for Tri-State against Farnsworth in the amount of $133,020.80. As between

Farnsworth and American, Farnsworth admittedly owed American the amount of $164,949.80 for materials. The jury returned a verdict in favor of American against Farnsworth in the amount of $151,142.35.

We submit that it is abundantly clear that Farnsworth's contentions are groundless. Moreover, it is noteworthy that Farnsworth has nowhere shown how or in what way it was prejudiced by any of the alleged errors it urges upon this court. The long and short of Farnsworth's position is that of objections purely on technical grounds, with no showing whatsoever of any prejudice to it. The questions presented by Farnsworth evolve around and involve factual determinations which have already been considered by the Court of Appeals adversely to Farnsworth.

There is no showing by Farnsworth of any constitutional issue in this case; nor is there any suggestion whatsoever of any conflict of circuits and certainly this case is not concerned with the administration of or interpretation of a Federal Act. It is not a case of any peculiar gravity or general importance to the public. It is simply a request for review of specific facts in an isolated situation. It is exceedingly doubtful if the same issues would ever recur again in another case.

Moreover, the case is concerned only with the application of familiar principles of law to a particular set of facts. The case turns on the evaluation of testimony and on the Court of Appeals' previous factual determination that the charges given by the trial court were correct statements of principles of law applicable to the factual issues presented. As such this court should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on application of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Company*, 274 U. S. 543,

544, 71 L. Ed. 1193, 1194, 47 S. Ct. 663; *N. L. R. B.* v. *Pittsburgh Steamship Company*, 340 U. S. 498, 503, 95 L. Ed. 479, 483, 71 S. Ct. 453.

The petitioner, in urging that the writ issue, has cited as authority and relied upon several cases arising under the Federal Employees Liability Act. It is submitted that this court granted certiorari in many cases of that class in order to correct a condition which it felt it should remedy; i. e., the misapplication of the Act and the deprivation of the injured employees' right to have the jury alone weigh disputed evidence. See concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69-70, 93 L. Ed. 497, 507-509, 69 S. Ct. 413. Whereas, here Farnsworth had the benefit of an extended jury trial, consuming 10 days, and which is included in a record of 1474 pages and numerous exhibits.

This court is being called upon to review a case which was before a jury for ten days, before the trial court, and before the Court of Appeals. There has been no showing of any obvious or exceptional error and as this court has many times held: "A court of law, such as this court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by the two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Manufacturing Company* v. *Linde Air Products Company*, 336 U. S. 271, 275 (2), 93 L. Ed. 672, 677, 69 S. Ct. 535.

Moreover, the writ of certiorari should be exercised sparingly and only in cases of gravity and importance. As was stated in *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393, 67 L. Ed. 712, 714, 43 S. Ct. 422: . . . "It is very important that we be consistent in not granting the writ of certiorari except in cases involving

principles, the statement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. The present case certainly comes under neither heading."

Statement of the Case.

On February 27, 1957, Farnsworth entered into a contract with the United States of America whereby, as general contractor, Farnsworth agreed to erect 74 multiple unit dwellings at Fort Stewart, Georgia, pursuant to the Capehart Family Housing Act. These 74 dwellings were of two types. The first, known as the "F" type dwelling, was a two-story eight-unit apartment, of which 40 buildings, consisting of 320 apartment units, would be built. The second type, known as the "C" type building, consisted of a two-unit one-story duplex, of which 34 buildings or 68 units would be built. The agreement provided that Farnsworth would be paid $6,230,100, which was subsequently paid to it (R. 1021).

The basic contract called for conventional construction, that is, construction on the site from raw materials with no prefabricated parts. Subsequently, it was determined to switch from conventional construction to prefabrication of the carpentry materials to be used in the project. Prefabrication would enable Farnsworth to eliminate a great deal of supervision and a great many workmen on the job (R. 589-590). American would provide the carpentry materials, prefabricated at its plant, for a total contract price of $860,178, which contract was executed by American on April 22, 1957. Prior to that time, on March 18, 1957, Farnsworth had entered into an agreement with Tri-State,

who had had previous experience with American's materials, wherein Tri-State was to erect the carpentry materials on the job at a contract price of $191,466.30. Approximately 20% of the total amount of work on the job would be done by Tri-State and American and the remaining 80% of the work would be performed by Farnsworth and by other subcontractors under its control and supervision (R. 697).

The Corps of Engineers, representing the United States, agreed to the switch from conventional construction to prefabrication of the carpentry materials on condition that shop drawings be submitted showing how this would be done, and on the further condition that one "pilot" building of each of the "F" and "C" type units be erected prior to the construction of the remaining dwellings (R. 149).

The purpose of the pilot building was to allow the mechanical trades and other subcontractors to go into the dwellings, examine them, and to work on each type, so that the "wrinkles" or "bugs" would be worked out and all parties could find out what changes had to be made to the "F" and "C" type buildings, before any additional buildings would be shipped in (R. 256-258, 300, 322, 411, 679, 817, 891, 1119).

The purpose of the shop drawings of the carpentry units to be shipped by American and the shop drawings of the various subcontractors under Farnsworth's supervision, was to indicate how the work of all of the trades and of the subcontractors would be correlated with the prefabricated carpentry materials (R. 303-304, 325, 1111-1112).

The pilot house never served its function because Farnsworth failed to require the erection and correlation of the various mechanical trades in the pilot houses (R. 103, 259, 260, 300, 301, 374). It was Farnsworth's responsibility,

as the prime contractor, to receive the shop drawings from American and from the other trades and other subcontractors and not only submit all of the shop drawings to the Corps of Engineers but to follow through with the Corps of Engineers and secure the latter's final approval of the shop drawings (R. 608, 685-686, 932-933).

The contract between Tri-State and Farnsworth provided in part, "The shipments of materials are scheduled by the contractor and American Houses, Inc., so that the first pilot buildings will be erected and closed in during the week of April 22, 1957". It is undisputed that at the time Tri-State began the work during the week of April 22, the pilot houses had not been completed as planned and no finally approved shop drawings had been furnished (R. 302).

The failure of Farnsworth to erect and close in the first pilot buildings during the week of April 22, 1957, was the first failure and default on the part of Farnsworth. Farnsworth's failure to procure finally approved shop drawings was its second breach and default.

The first stage in the construction of the buildings was the forming and laying of concrete slabs and foundations by Farnsworth. It was delayed at the outset of the work.

The Purchase Order agreement between American and Farnsworth established a delivery schedule for the carpentry materials prefabricated by American. During the planned erection of the pilot houses, additional buildings were not supposed to be shipped until the bugs had been eliminated from the pilot houses (R. 299, 301) and before final shop drawings indicating thereon the changes in construction were approved (R. 302). American did not want to deliver any materials to the job until Farnsworth had received from the Corps of Engineers the finally approved shop drawings (R. 689). However, Farnsworth insisted

that American continue with the shipment of materials and that American adhere to the delivery schedule (R. 206, 207, 366, 1131).

So it was, then, that when the preparation of the slabs and foundations by Farnsworth was delayed, and the pilot houses had not been completed, American offered to hold up future shipments (R. 101, 365) and wired Farnsworth, offering to suspend delivery of materials (R. 690-691). However, Farnsworth insisted on delivery of the units (R. 206-207, 366) which piled up on the job (R. 752).

The failure of Farnsworth to construct the pilot house and to have finally approved shop drawings, its delay in laying the slabs and foundations, and its insistence on the delivery of materials to the job, created a chaotic condition (R. 102-104, 301, 311). Farnsworth pushed ahead with construction and insisted that Tri-State continue on with the erection of the carpentry materials, despite the fact that there were no shop drawings and there had been no correlation between the carpentry materials and the work of the other trades, such as the plumbing and heating contractors. As a result, Tri-State was required to do a great deal of extra work which was not contemplated for in its contract (R. 94-96). Mr. McMaster, Field Representative of Farnsworth, and W. K. Converse, Field Representative of Tri-State, agreed that Tri-State would perform all of this extra work and that Farnsworth would see that Tri-State was paid therefor (R. 126, 432). This agreement was later confirmed by letter from Tri-State to Farnsworth (R. 129). The Government building inspector on the project testified that on several occasions he had heard Farnsworth's superintendent authorize Tri-State to do extra work (R. 415-416).

In reliance upon Farnsworth's assurance that Tri-State would be paid, Tri-State proceeded on with this extra work.

Finally, in September 1957, Tri-State reached the point where it had to have money in payment of the extra work in order to continue on with the job. At a meeting in the latter part of September, American advanced Tri-State the sum of $17,500.00, with no admission of any responsibility by American but simply as an advance to allow Tri-State to continue (R. 1184, 1185). This made a total of $38,879.86 advanced by American to Tri-State for this purpose. At this meeting Tri-State submitted to Farnsworth its claim for the extra work it had done to that date. The total amount was $112,460.92. Farnsworth did not then nor during the trial did it ever deny that Tri-State had in fact done that much work. It simply refused to pay anything to Tri-State and admittedly did not ask that any of Tri-State's claims for extra work be explained, identified or described (R. 653, 654). On October 3, Tri-State made further demand on Farnsworth for some payment which Farnsworth refused and on October 4, Tri-State left the job.

Following Tri-State's departure from the job, Farnsworth continued on and completed the work. In this regard American, on April 4, 1957, had delivered to Farnsworth a letter agreeing to procure another contractor in the event that Tri-State defaulted on the job. One of the issues presented to the jury was whether Tri-State was in default for leaving the job on October 4. The jury resolved this issue in favor of Tri-State. Since American was not responsible for Tri-State's performance or responsible for procuring another contractor unless Tri-State had broken its contract, then when it was found that Tri-State was not in default, American's responsibility never became operative. As the Court of Appeals stated in its opinion, page 736, headnote 4, "If default on the part of Farnsworth, making it impossible for Tri-State to continue, was avail-

able as a defense to Tri-State, it was available to American also."

Thereafter, Tri-State instituted suit against Farnsworth to recover the amount of $146,518.28 due it for work done which Farnsworth had refused to pay. The basic factual questions submitted to the jury with respect to Tri-State's claim against Farnsworth were: (1) Did Tri-State perform extra work outside the scope of its subcontract? (2) Did Tri-State and Farnsworth depart from the written subcontract in entering into a separate agreement, expressed or implied, to pay Tri-State for any such extra work? (3) If there was such an agreement, did Farnsworth default in its obligations to Tri-State in connection therewith? (4) Was Tri-State justified in departing the job as a result of any default of Farnsworth?

The jury resolved these issues in favor of Tri-State and against Farnsworth and returned a verdict in favor of Tri-State in the amount of $133,020.80 (R. 1395).

Tri-State did not, as Farnsworth says at the bottom of page 6 and the top of page 7 and again at bottom of page 10 of its petition, base its claim in part because of American's failure to deliver materials. This statement of Farnsworth is completely erroneous. As is noted, hereinafter, Farnsworth's argument (A-1-b at pages 11-12 of its petition) is based on this misstatement of fact. Tri-State's cause of action against Farnsworth was based solely on Farnsworth's refusal to pay Tri-State for work done for Farnsworth at its request.

Farnsworth counterclaimed against Tri-State and in turn filed a third party complaint against American, alleging that it was damaged because American had failed to furnish proper materials and because American had not procured a contractor to complete the work. American in turn counterclaimed against Farnsworth to recover the

value of materials delivered to Farnsworth. In this connection, Farnsworth admitted that it owed American $164,949.80 for materials delivered (R. 982, 1008). These issues were submitted to the jury and the jury found against Farnsworth on its claims and found in favor of American on its claim and returned a verdict in favor of American against Farnsworth in the amount of $151,142.35 (R. 1395).

ARGUMENT.

A.

1. Alleged Erroneous and Conflicting Charges.

a.

Certain of the charges given by the trial court are complained of by Farnsworth. These charges were carefully considered by the Court of Appeals and were found to correctly state the law of the case. As is hereinafter shown, and as the Court of Appeals has found, "Farnsworth cannot complain of any conflicts brought about by its own erroneous requests" to charge (271 F. 2d at page 737, headnote 9).

The Court of Appeals carefully considered the charges complained of by Farnsworth in Subsection "b" of its argument (see headnotes 2, 3 and 4 of the opinion at pages 733-736), and considered the charge complained of by Farnsworth in Subsection "c" of its argument (headnotes 7 and 8 of the opinion at page 737), and found no error.

If the charge of the court is in any way conflicting and contradictory it was occasioned by Farnsworth's own erroneous requests to charge. In this regard it will be remembered that at the inception of the trial and pursuant

to the request of the court, all parties submitted requests to charge. At this time Farnsworth submitted six requests (R. 1375-1382). Subsequently at the eleventh hour, and midway of the second week of the trial, it dropped its initial requests to charge and in lieu thereof submitted its 23 requests to charge (R. 1358-1374). Prior to the argument to the jury, the trial court read to counsel its proposed charge to the jury which included all of Farnsworth's requests to charge. At this stage of the proceedings certain objections were raised to the charges and counsel for Tri-State wanted to "thrash" the matter out then as to the objections raised to the charges (R. 1253). However, Farnsworth's counsel encouraged the postponement of any consideration of the objections to the charges until after the jury was charged, at which time the parties would simply file their exceptions to the charges (R. 1252-1253).

If the charges were contradictory, as Farnsworth now so vehemently claims, then it was incumbent upon it at that time to "thrash out the issues" within the spirit of Rule 51 of Federal Rules of Civil Procedure so that if there was error in the charges the trial judge would have the opportunity to correct them. This Farnsworth did not do and it cannot now be heard to complain. "A litigant cannot, by remaining silent when he should speak, put the court into error by afterward complaining of his action." *Defonce Construction Company, Inc.* v. *City of Miami*, 256 F. 2d 425, 428 (5th Cir. 1958) and cases cited at footnote 2. It is well settled upon the grounds of estoppel that Farnsworth cannot complain of any alleged inconsistent or confusing charges which are "invited" and brought about by its own erroneous charges. *United States* v. *Wurtsbaugh*, 140 F. 2d 534, 537, (1) (5th Cir. 1944); *Illinois Central Railroad Company* v. *Griffin*, 80 Fed. 278, 282 (7) (7th Cir. 1897).

b.

In Subsection "b" of its argument Farnsworth complains of three charges and alleges, in effect, that the charges made it the guarantor of American's performance. This contention is completely without merit and is based on an assumption by Farnsworth which has no support in the record of this case. As we have hereinbefore pointed out (page 11) the sole theory of Tri-State's case was Farnsworth's refusal to pay it the sums of money due it for work done by Tri-State at Farnsworth's request. Tri-State made no claim against Farnsworth because of any failure of American to deliver materials. On the other hand, it was Farnsworth—not Tri-State—that sued American, claiming damages from it for alleged failure to deliver materials. American in turn claimed amounts due from Farnsworth (which Farnsworth admitted it owed to American) for materials furnished by American to Farnsworth.

We come then to consider the first charge complained of by Farnsworth in Subsection "b" of this portion of its argument. The quotation by it from the charge is taken out of context and to properly understand the charge, it is quoted here in full (R. 1302):

> "Gentlemen of the jury, in the event you should find that Tri-State has incurred additional expense for labor or materials as the sole and direct result of the failure of American Houses to furnish materials as provided for in the contract between American Houses and Farnsworth, I charge you that Tri-State would be entitled to recover any such expense from the defendant Farnsworth, and in that event Farnsworth in turn would be entitled to recover an equal amount from American Houses."

The portions of the charge which were omitted by Farnsworth and which are now properly inserted, gives the com-

plete meaning of the charge and completely rebuts the contentions of Farnsworth that this charge made it the guarantor of American. The charge simply means that in the event Tri-State should recover from Farnsworth for any failure of American to furnish materials, then Farnsworth in turn would be entitled to recover an equal amount from American. Farnsworth would be left whole.

In this same regard it is particularly interesting that Farnsworth has seen fit to complain of that charge when it requested the virtually identical charge (Request No. 16, R. 1368), which was charged by the trial court (R. 1314-1315) and which charge in reference to American's obligation to deliver materials states in its last sentence thereof:

> "If you find that American Houses failed to comply with said obligation and that as a result thereof Tri-State sustained certain damages, and if you allow Tri-State to recover from Farnsworth all or any part of said damages you must allow Farnsworth to recover the same amount over against American Houses."

Farnsworth's own request to charge is the same in scope and in purpose as that to which it has made an objection. Surely it cannot be said to have been prejudiced by a charge which it has used itself. "A party cannot complain of an alleged error in instructions when the same error is found in its own instructions." *Krienke* v. *Illinois Central Railroad Company*, 249 F. 2d 840, 846(6) (7th Cir. 1957).

We turn now to the last two charges complained of by Farnsworth in Subsection "b" of its argument at page 11. These charges were considered and approved by the Court of Appeals (pages 733-736). The two charges complained of were requests to charge of American Surety Company of New York (R. 1382-1384), who was Tri-State's surety.

It will be remembered that American Surety was surety on Tri-State's performance bond under Tri-State's contract with Farnsworth and Farnsworth was made an obligee under this bond. Subsequently, at Farnsworth's own request American was added as a co-obligee with Farnsworth on this performance bond, (R. 1201) so that they became joint obligees.

It is well settled that in the event either of said co-obligees, either Farnsworth or American, should default in the performance of the obligations imposed upon them under the prime contract, the subcontract with Tri-State, and the purchase order to American, and if such defaults of either of them should contribute to the inability and failure of Tri-State to complete performance of the contract, then the effect of any such default would be to increase the risk of the surety, as surety on the bond of Tri-State, and would discharge the surety, American Surety Company, from liability thereon. *Seaboard Loan Corporation* v. *McCall*, 61 Ga. App. 752, 754, 7 S. E. 2d 318, 319 (1940); *Scarratt, et al.* v. *Cook Brewing Company*, 117 Ga. 181 (3); 43 S. E. 413(3); *Georgia Code Annotated*, Section 103-203.

It was in this status, then, that American Surety Company requested the court to charge the jury (R. 1382-1384) that it would not be responsible on its performance bond if either of said joint obligees, Farnsworth or American, defaulted in its obligations. Whereupon the trial court charged in this respect and it is submitted that the charges are eminently proper (R. 1319-1320):

> "The Defendant Farnsworth has filed in this case a third party complaint against the American Surety Company of New York in which the Defendant Farnsworth is seeking to recover from the American Surety Company of New York, as surety on the performance bond given by the Plaintiff, Tri-State Con-

struction Company, damages alleged by Farnsworth to have been sustained by it as a result of the failure and default of Tri-State Construction Company to perform and complete its contract with Farnsworth.

"In this connection, I charge you that, while Tri-State was obligated to carry out its contract with Farnsworth in accordance with the terms thereof, this obligation was conditioned upon Farnsworth performing, in a workmanlike manner, the work it was obligated to perform under its prime contract, and American Houses furnishing, in a workmanlike manner, the materials it was obligated to furnish under its purchase order, to the extent necessary to enable Tri-State to perform the work it was obligated to do, and I instruct you that the liability of the American Surety Company, as surety on the aforesaid performance bond, was similarly conditioned.

"For that reason, in the event you should find that Farnsworth or American Houses has failed to perform work or to furnish materials which they were obligated to furnish or perform in accordance with said contracts, or said purchase order, or that they have defaulted in the proper performance or coordination of work which they were obligated to do or to coordinate, and you further find that such failure or default on their part caused or materially contributed to the failure or inability of Tri-State Construction Company to complete the performance of its subcontract in accordance with its terms, then and in such event neither Farnsworth nor American Houses would be entitled to recover from the American Surety Company, as surety, or Tri-State Construction Company, as the principal, on said performance bond.

"You are also further instructed that, in the event you find that Farnsworth or American Houses was indebted to Tri-State Construction Company

for work done on said job and wrongfully refused to pay Tri-State for such work and thereby caused or contributed to the inability of Tri-State to complete performance of said contract, as contended by American Surety Company and Tri-State, then and in that event neither Farnsworth nor American Houses would be entitled to recover from American Surety Company, as surety, or from Tri-State Construction Company, as principal, on said performance bond.

"Whether Farnsworth or American Houses has defaulted in the performance of any obligations imposed upon them under said contracts or has failed to pay Tri-State any monies lawfully due, and whether any such default or failure caused or contributed to the inability or failure of Tri-State to complete the performance of its subcontract are questions of fact for determination by you with respect to which the Court expresses no opinion."

c.

Turning now to Subsection "c" of this portion of Farnsworth's argument, it complains of Tri-State's request to charge No. 4 (R. 1392), which was charged by the court (R. 1300-1301), upon the alleged grounds that it dispensed with Tri-State's burden of proving a waiver of the requirements of the subcontract with respect to written change orders.

The absurdity of Farnsworth's contention is immediately apparent when we consider Request No. 3 of Tri-State (R. 1390, 1391) which was charged by the court (R. 1299) immediately preceding the charge complained of by Farnsworth (R. 1300-1301). The preceding charge of the trial court correctly and fully charged the jury on the question of waiver of the requirement of written change orders in the contract (R. 1299). It is noteworthy that

Farnsworth does not contend that this charge is in any way erroneous. Moreover, it admits that the court correctly charged the jury on its own request to charge on waiver (R. 1360, 1307).

The trial court followed its charge on waiver of written change orders with the charge complained of by Farnsworth which is manifestly correct and not erroneous (R. 1300-1301):

> "In this connection, Gentlemen, I charge you that if you find that Tri-State Construction Company has performed services in the form of labor and materials in behalf of and at the instance of the defendant Farnsworth and that these services were received and accepted and were of a benefit to the defendant Farnsworth, and that Tri-State was not in any wise in default, then and in that event, you gentlemen shall determine the reasonable value of the labor and materials furnished, and return a verdict in favor of Tri-State and against the Defendant Farnsworth in an amount properly determined by you."

As the Court of Appeals held: "Under Georgia law, Tri-State, if not itself in default, would be entitled to recover in *quantum meruit* for all services performed at the request of and for the benefit of Farnsworth whether required by the original contract or by the claimed subsequent modification" (271 F. 2d at 737, headnote 8).

It is evident, then, that the charges given by the trial court correctly stated the law applicable to the issues of this case.

2. Alleged Contract Interpretation by Jury.

This allegation of error by Farnsworth was carefully considered by the Court of Appeals who found no errors (271 F. 2d at 733, headnotes 1 and 2). It is quite clear that the court did not direct the jury to interpret the agreements. At the very outset of the trial court's charge (R. 1282) he charged:

> "The court will not attempt to exhaustively review or detail the terms and conditions of the aforementioned contracts. These documents are attached to the pleadings which will be given you at an appropriate time and you, gentlemen, are invited and instructed to refer to these documents to determine their content."

Subsequent to this charge the court made a similar reference to the pleadings and contracts (R. 1298):

> "Various other defensive pleadings have been filed by the parties involved which are also in the form of general denials.
>
> "Gentlemen, the pleadings will be out with you, as I said just now, not as evidence, but for you to read over and get the exact contentions of the respective parties, if you so desire. Now, of course, the Court has not attempted to outline the contents of these contracts to you, but you are instructed to refer to them directly in order to determine for yourselves their contents and the duties and obligations imposed upon the respective parties."

When the entire charges are read, and not portions out of context as referred to by Farnsworth, there is no question but what, as the Circuit Court of Appeals has held, the Court's meaning and intent was to submit to the jury the

pleadings and the contracts in order for the jury to see their contents. Obviously, the charges were not erroneous.

Moreover, the contract between Tri-State and Farnsworth contained technical words and ambiguous terms, such as "pilot house" and "finally approved shop drawings," and there was a great deal of testimony throughout the record relating to the meaning of these terms and the function and purpose of such a pilot house and such shop drawings. In such a situation where the terms are ambiguous and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact. *Hawkins* v. *Frick-Reid Supply Corporation*, 154 F. 2d 88, 89(4) (5th Cir. 1946); *J. T. Majors & Son, Inc.* v. *Lippert Bros., Inc.*, 263 F. 2d 650, 653, 654 (3) (10th Cir. 1958).

Farnsworth contends that there was no reason for the jury to examine the contents of the contracts. On the other hand, throughout the trial counsel for Farnsworth on numerous occasions read provisions of these contracts to the jury In this setting it has no grounds to complain of the court submitting the contracts to the jury along with the pleadings and other documentary evidence.

3. Legal Argument to Court.

Farnsworth complains and contends that counsel for Tri-State was permitted to argue his legal contentions. At the outset it is important to note that counsel did not read the law. He simply summarized the applicable principles of law pertaining to waiver and to excuse for non-performance of a contract because of failure of payment (R. 1277-1278, 1280). Moreover, counsel's argument was addressed to the court—not the jury—and the colloquy took place

between the court and counsel. Furthermore, Farnsworth does not contend that counsel's argument was an erroneous statement of the law or that it was not applicable to the issues presented in this case. It simply objects to counsel's right to argue the applicable law.

This court is entitled to take judicial knowledge of the custom prevailing in the lower courts of Georgia and in the Federal District Courts of Georgia where counsel for both sides utilized the first portion of their final argument in addressing the court in the presence of the jury and referring to the court at that time the legal principles which counsel contend are involved in the case. This practice follows the procedure outlined in Rule 19 of the Rules of the Superior Court of Georgia codified in the *Georgia Code Annotated* at Section 24-3319 and which practice has been approved by the Supreme Court of Georgia. *Rutledge* v. *Hudson*, 80 Ga. 266, 268; 5 S. E. 93, 95 (4) (1887); *Slaughter* v. *Heath*, 127 Ga. 747, 759; 57 S. E. 69, 75 (8) (1907). Farnsworth had experienced trial counsel of Georgia representing it, who had full opportunity to do the same.

Counsel did not read the law, but if he had, such practice is permissible and not improper. *Michigan Mutual Life Insurance Co.* v. *Oliver*, 256 F. 212 (5) (5th Cir. 1919); cert. den. 250 U. S. 646, 39 S. Ct. 494, 63 L. Ed. 1187.

Moreover, matters pertaining to final argument are largely within the discretion of the trial court. *Franklin* v. *Shelton*, 250 F. 2d 92, 99 (21) (10th Cir. 1957).

In the Federal courts counsel can argue the issues of the case, *the applicable law*, the pertinent evidence and such legitimate inferences as may properly be drawn therefrom. *London Guarantee and Accident Company* v. *Woelfle*, 83 F. 2d 325, 342 (29) (8th Cir. 1936). See also *Tashjian* v. *Boston & Maine R. R.*, 80 F. 2d 320, 321 (1st Cir. 1935).

It has been held to be proper to summarize the law of contributory negligence before the jury in a Federal Employees Liability Act case. *Chicago Great Western Railway Company* v. *Scovel*, 232 F. 2d 952, 957-958 (11), (8th Cir. 1956); cert. den. 352 U. S. 835, 77 S. Ct. 53, 1 L. Ed. 2d 54.

The argument of law to the court was applicable to the issues of the case, was in no way prejudicial or harmful to petitioner, was within the discretion of the trial court, and was in no way improper.

4. Prejudicial Comments.

The additions of the trial court to the requests to charge of Farnsworth speak for themselves and we submit to the court that each of them was correct in every respect and not prejudicial to Farnsworth. Moreover, insofar as any repetition or undue prominence is concerned, the court should bear in mind that Farnsworth requested 23 separate requests to charge whereas the other parties in the case made a total of only 14. Many of Farnsworth's charges, including those referred to by it in its appendix to its petition, were categorical in nature with little qualifying language. To be compared are the charges of the other parties which contain carefully phrased qualifications and primarily point up the factual issues to be considered by the jury. In order to give a fair charge, some interjection by the court to Farnsworth's request was essential.

Farnsworth complains of an alleged approval by the trial judge of the legal contentions stated in Tri-State's closing argument to the jury. The instance referred to took place in a colloquy between counsel and the court regarding the court's prior ruling on the introduction of

evidence relative to evidence on waiver of "written change orders" (R. 110, 124, 1276). However, Farnsworth admits on page 13 of its petition to this court that the trial court "correctly charged the jury" with respect to the waiver of this provision of the contract. How, then, can Farnsworth complain of the approval by the trial court of a legal contention which it admits is correct? Surely, no error has been committed.

B.

No Basis Exists for the Issuance of a Writ of Certiorari.

It is submitted that the foregoing, and particularly the Statement of the Case contained at pages 6 to 12, shows conclusively that the verdict of the jury was a just and proper one, and was demanded by the evidence presented. It is further submitted that there is no basis in law or in fact for the allegations of error contended for by petitioner, that the trial court did not commit error, and that the affirmance of the judgment of the trial court by the United States Court of Appeals for the Fifth Circuit was correct and proper.

Moreover, as we have heretofore pointed out at pages 2 through 5 of this brief under the title *QUESTION PRESENTED*, this case is not a proper case for the granting of a writ of certiorari. This case does not involve principles of general importance to the public nor does it involve a conflict of opinion between Circuit Courts of Appeals. The petitioner is simply requesting review of specific facts in an isolated situation. This case turns on the evaluation of testimony and on the factual determination by the trial court and by the Court of Appeals that

charges given by the trial court were correct statements of principles of law applicable to the factual issues presented. These factual issues have already been considered by both courts adversely to Farnsworth and a writ of certiorari should not issue to review the concurrent findings of fact in this case. *N. L. R. B.* v. *Pittsburg Steamship Company*, 340 U. S. 498, 503, *supra* at 4; *Graver Tank and Manufacturing Company* v. *Linde Air Products Company*, 336 U. S. 271, 275 (2); *supra* at 5; *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393, *supra* at 5.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

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